UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

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BOBETTE J. MORIN,

Plaintiff,

vs. 07-CV-517

HONORABLE JAMES C. TORMEY, ET AL.,

Defendants.

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Transcript of a Motion held on October 11, 2007, before the HONORABLE DAVID N. HURD, at the United States Federal Courthouse, 10 Broad Street, Utica, New York, before Nancy L. Freddoso, Registered Professional Reporter and Notary Public in and for the State of New York.

NANCY L. FREDDOSO, R.P.R.
Official United States Court Reporter
10 Broad Street, Room 316
Utica, New York 13501
(315) 793-8114

A P P E A R A N C E S

For Plaintiff:

SAPIR & FRUMKIN LLP
ATTORNEYS AT LAW
399 KNOLLWOOD ROAD
SUITE 310
WHITE PLAINS, NEW YORK 10603
BY: DANIEL T. DRIESEN, ESQUIRE

For Defendant:

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
ALBANY, NEW YORK 12224-0341
BY: CHARLES J. QUACKENBUSH, AAG

(WHEREUPON, the proceedings held on October 11, 2007, were commenced.)

COURT CLERK: Bobette Morin versus Honorable James Tormey, et al. 2007-CV-517.

Counselors, your appearance for the record, please.

MR. DRIESEN: Daniel Driesen for the plaintiff. Good morning, your Honor.

MR. QUACKENBUSH: Charles Quackenbush from the Office of the New York State Attorney General on behalf of the Office of Court Administration. Good morning, your Honor.

THE COURT: Good morning.

Mr. Quackenbush, I guess we are down to, at this stage of the proceedings, why the individual defendants should not continue to be in this lawsuit. So you can tell me why you think they should at this stage where we are just at the pleading stage.

MR. QUACKENBUSH: Yes, your Honor. Even at the pleading stage, it is proper for the Court to consider matters of jurisdiction. Sovereign immunity under the Eleventh Amendment is obviously an essential jurisdictional issue, even though the plaintiff --

THE COURT: For individual defendants,

sovereign immunity? That's a unique proposition, isn't it?

MR. QUACKENBUSH: No, it is not. In our papers, I emphasized Judge McAvoy's position in the McGregor case. In many cases --

THE COURT: Did he dismiss that case at the pleading stage? That's where we are now, pleading stage.

MR. QUACKENBUSH: Yes. I hesitate to answer that. I am not sure of the answer.

THE COURT: I don't think he did.

MR. QUACKENBUSH: Okay. The principles that he enforced in that case come to bear here. The fact that the individual defendants are nominally before you --

THE COURT: What do you mean nominally? They are before me on a complaint that has about one hundred and forty-some paragraphs of detailed acts by these four defendants. Whether they are true or not, I must assume them all to be true at this point.

MR. QUACKENBUSH: Well, the complaint is admittedly vast. However, as I have emphasized in our submissions, there is very little in that massive allegations which attributes particular conduct to individual defendants.

The substance of this matter has to prevail over the fact that they are listed as individual

capacity people. Every action which is discernible from the complaint by each of these defendants was taken in the course of their professional duties, in the context of their work, in the context of the plaintiff's work.

The fact of the matter is that every moment which the plaintiff alleges one of these defendants did anything, they were doing it in the course of their official duties.

Moreover, the plaintiff seeks remedies --

THE COURT: But all the time we have defendants who are employed by municipalities and they are police officers and doing things as part of their thing, but they are still individually liable. That doesn't immune them from liability just because they are acting as police officers or acting as court administer or whatever. I mean that's not the law, is it?

MR. QUACKENBUSH: It can be. In each particular case, the Court has to examine the substance of allegations against them.

THE COURT: That might be more appropriate for a summary judgment motion after the plaintiff has had some discovery.

Here, the allegations are, we have got one hundred and forty-two paragraphs of allegations here, and you are saying that as a matter of law, the complaint

should be dismissed, and quite -- what is your best argument for that?

MR. QUACKENBUSH: Well, I spent the past few minutes talking about sovereign immunity. I will rest on our writing on that and move on.

Setting that issue aside, first, there is -- there are insufficient allegations of personal involvement. We have both observed that the complaint is presented in massive fashion.

However, quality has to prevail over quantity, and after you have sifted and dissected through the allegations, I urge you to agree with me that there is so little alleged against each of these individual defendants that, even under Rule 12(b), the action should not be permitted to proceed.

THE COURT: Is it the quantity that's allocated, rather than the quality? In other words, if you only allege one wrongdoing, that's not enough. You have to allege a dozen wrongdoings in order to get by the pleading stage?

MR. QUACKENBUSH: Well, the plaintiff's complaint of retaliation is based on a notion of hostile work environment, and as you know from employment discrimination cases, a hostile work environment can take the form of a lost course of identified harassing incidents

or it can take the form of a small number of extraordinary toxic and powerful incidents.

Here we have neither. Here, we have a private conference in chambers in the summer of 2002 with an Administrative Judge. The plaintiff at that time, and for several years thereafter until January of 2007, she was the highest ranking clerical employee there. She essentially answered directly to the Administrative Judge.

She was a direct class management confidential employee taking part at a private meeting in chambers with her boss. She alleges that she discussed some upcoming political matters with Judge Tormey and with Mr. Voninski, the executive assistant.

She alleges that they had a disagreement about these political matters. They went their separate ways, and she harbored some bad feelings about that meeting, and then the record as of henceforth is empty. You don't have any significant harassment or hostile work events featuring named individuals, featuring dates, featuring contacts, until the spring of 2005.

In the spring of 2005, the complaint begins to be drawn into sharper focus. At that point, the plaintiff claims that she took her first personal medical leave and, in the original version of her complaint, harassing events accelerated therefrom.

Well, as you know, the FMLA claims originally presented in the case are out. Any retaliation or harassment based upon the plaintiff's taking personal medical leave are immaterial to this action.

The only cognizable source of harassing actions has to be the summer of 2002 conference with Judge Tormey and Mr. Voninski. And when you closely study the timeline presented by the plaintiff from the summer of 2002 to the spring of 2005, you will realize it is entirely vacant.

In the aftermath of the plaintiff's first medical leave in the spring of 2002, she describes some unpleasant encounters with Mr. Voninski and with Mr. Dowling. She describes no encounters with -- that I can recall, with Judge Hedges at all.

And so I believe that when you view things through that lens, you will appreciate that there is no alleged individual personal conduct upon which she can base a claim that she has been retaliated against for protected activity.

As for her activity, itself, Ms. -- the plaintiff offers three prongs. She contends that her protected activity consisted of political speech or political conduct or in their motion response, they have added a theory that she suffered an injury to her rights of

association. All three of those types of matters would be examined under the same basic analysis under the Connick decision which I have discussed in our papers. So I will treat them in unified fashion.

I have tried to, as well as I could in our papers, dissect through the plaintiff's allegations and pull out any allegation of a speech event. Any allegation in which she describes that there was a conversation or verbal conduct or any significant activity with an identified person, are pulled out in her papers and examined.

There is not a single incident of a conversation or communication concerning public matters. Every single conversation that the plaintiff describes having, every letter she describes issuing, for instance, to the Inspector General, they concern her private, personal interests.

In the late 2006 or sometime in 2006, the plaintiff realized that the office of the Inspector General for the Unified Court System was conducting its independent investigation into her behavior in the workplace.

The plaintiff on at least two occasions, perhaps three, communicated with the Inspector General's office to air her side of the story to contribute her point of view to the investigation. These were her private,

personal concerns which, she rightly recognized, could have an effect on her own employment situation.

For those reasons, in that context, in that form, the plaintiff spoke up to a limited audience, the Inspector General, who I emphasize is working under principles of confidentiality. She expressed her complaints and concerns about the operation of the court system at that time in late 2006.

We have to keep looking back in time to the wellspring from which her First Amendment claims supposedly flows. The source of that First Amendment claim is a private conversation in the summer of 2002 in Judge Tormey's chambers.

There is no allegation that Judge Tormey or Mr. Voninski publicized Ms. Morin's political views. There is no allegation that Ms. Morin went out to any public forum or gave any speeches to any sort of politically interested gathering about this matter.

Ms. Morin was the number one administrative employee in Judge Tormey's court system. They had an exchange in which the plaintiff alleges they disagreed about politics, and that the Second Circuit has emphatically discussed in the Alfano decision. The Court is presented with an invitation to step in as some sort of super personnel conflict resolution here.

The most that Ms. Morin presents is a personality conflict with a senior supervisor which ultimately led to a change of her employment conditions, which, even that, is completely untenable.

In our papers in our original motion to dismiss, we pointed out that her changing employment, the elimination of her prior job, her reassignment to a new job, was caused by the intervening events of the Inspector General's office only after the Inspector General issued its recommendation.

THE COURT: Is that alleged in the complaint?

MR. QUACKENBUSH: Yes.

THE COURT: I mean, is that what she alleges, that there was an intervening event or is that your interpretation of it?

MR. QUACKENBUSH: That's my interpretation clearly.

THE COURT: Well, that is not quite appropriate in a motion to dismiss, is it?

MR. QUACKENBUSH: Well, the circumstances --

THE COURT: I thought we were taking the complaint as true in this motion, correct?

MR. QUACKENBUSH: Yes.

THE COURT: So you are putting -- you want to put on some of your interpretations, do you not, of what the complaint says in order to have it dismissed as a matter of law, and that would be improper, don't you agree?

MR. QUACKENBUSH: Your Honor, all I seek to do is to offer my fair reading of the complaint, the fair --

THE COURT: Well, that's one way of putting it, but it is your interpretation of the complaint, is what you want to, and I am sure that that's not my job to interpret the complaint, is to take it as true, and assuming the facts in the complaint to be true, whether it allows the plaintiff to go forward or whether, as a matter of law, it should be dismissed. But you are going beyond the complaint now, are you not?

MR. QUACKENBUSH: I don't believe so. I believe that it is our job to read the complaint to some extent literally. Of course, there are sections of the complaint that we cannot take literally as I have emphasized. The enormous majority of the complaint is submitted in inappropriate fashion with no identifiable actors, no identifiable dates, no identifiable context, dozens upon dozens of speculative allegations and inappropriate allegations based upon information and believe.

The huge majority of this complaint provides no fair notice upon which a defendant can defend against the claims.

THE COURT: You are saying -- you are telling me that this complaint of one hundred and fifty-two paragraphs, you have no notice of what she is claiming at this point. Is that what you are arguing?

MR. QUACKENBUSH: I am saying that when --

THE COURT: You don't have notice of what this is all about?

MR. QUACKENBUSH: We have notice of what the large story is, but when the plaintiff complains that there are paragraphs which state that an ongoing course of harassing conduct ensued, well, the complaint never specifies what those events were, who the people were that were involved.

If the claim that's before the Court is that of a hostile work environment, the plaintiff is obliged to present appropriate allegations with which to substantiate it.

Now, of course, under federal rules, she doesn't have to present a six hundred paragraph tome, but she does have to give the Court and the defense a clear reckoning of what they are looking at, and an unacceptable majority of her allegations are in unacceptable form.

You have emphasized or you pointed out that under Rule 12(b), we do have obligation to regard the plaintiff's allegations as true. I agree, of course, that's the standard, but they have to be appropriate allegations in the first place, and far too many of them in this action are not appropriate.

As for -- well --

THE COURT: So if we eliminate all the non-appropriate, we still have a great deal of factual allegations here, do we not, that would put you and your clients on notice as to what the claim here is all about, do we not?

MR. QUACKENBUSH: Yes, and to the best that we have been able, we have addressed them.

THE COURT: So that means the complaint is sufficient in that regard, and we should move forward, isn't that true?

MR. QUACKENBUSH: No, no, your Honor.

THE COURT: Well, Mr. Quackenbush, I have heard enough. Let's move on.

Mr. Driesen, you may be heard.

MR. DRIESEN: Thank you, your Honor.

As your Honor alluded to throughout Mr. Quackenbush's recitation, the pleading threshold for a complaint in federal court under Rule 8(a)(2) is a low

threshold. She doesn't have to put defendants on notice. She far excelled that threshold and cleared that bar throughout, as you noted, one hundred and forty-plus paragraphs of a complaint.

I dispute quite clearly the type of attack that is being made on this complaint because it is more akin to a summary judgment.

THE COURT: Well, you made some allegations in your complaint that you now agree are not appropriate, correct?

MR. DRIESEN: Well, I will get to --

THE COURT: Well, you haven't -- about the defendants being in their official capacity.

MR. DRIESEN: Correct.

THE COURT: So you made that allegation in the complaint that it was unnecessary. You also made some allegations under the Family Medical Leave Act that were inappropriate, and you admit that they should be dismissed.

MR. DRIESEN: Correct, your Honor. We have abandoned parts of the complaint, but the individual defendants and the issues that pertain to them directly are sufficiently pled in the complaint, and the citations that try to dismiss the complaint against them are largely citations for summary judgment cases.

Referable to the Alfano case cited by

counsel today, it is interesting because the Alfano decision that was cited wasn't even a summary judgment decision. It was a Rule 50(a) post-trial motion that was granted.

Alfano survived a motion to dismiss, as we should. We should have the opportunity to present the evidence. You know, on the one hand, we are being told that there is -- our complaint is voluminous and is too long, and on the other hand, we are being told we haven't pled enough information. That's just simply -- they are contradictory, and they are opposite.

There is sufficient information being pled in here, and the issues that arose are being characterized by the defendants in a way that is inappropriate for a motion to dismiss.

They refer to a meeting in the summer of 2002 as an interpersonal conflict. They refer to Ms. Morin's demotion or retaliatory transfer from the highest level of a judicial grade thirty-two position to a grade twelve file clerk's position one hundred miles from her home as an opportunity to exceed. That is an unfair inference that can be drawn, and certainly cannot be drawn from the complaint as it is pled.

The complaint is sufficient. Citing to McGregor as inapposite because that is a FMLA claim, FMLA

case, a 1983 individual liability claim. And in response to that, we did cite a Supreme Court case, a Second Circuit case that says those types of damages, those types of claims can succeed under 1983.

With respect to the personal involvement of the individual defendants, our papers, I think pages nine, ten, and eleven, detail and cite the individual defendants, cites to paragraphs in the complaint that refers to direct action by these individuals that meet the sufficient four-point standard to show personal involvement that they directly participated in this action; that they failed to remedy their wrongdoing that they created; and allowed unconstitutional policies and customs to proceed, and other grossly negligent actions, and for each of the defendants that were individually named, we cited paragraphs in the complaint that addressed those things.

In addition, the allegation that, upon information and belief, the pleading was insufficient or refer to hearsay and characterizing certain allegations as spurious, we are not here to decide hearsay. I can address that because those were statements that were elicited from the individual defendants. But this isn't the stage where that question is raised and answered.

The allegations upon information and belief, as we have indicated in our opposition papers, were

statements that were relayed directly to Ms. Morin from people who were present at the time. That's more than sufficient. She doesn't have to be the personal observer of every fact, and discovery is meant to elicit that information to provide an opportunity at that point to determine if those allegations are sufficient or if they are faulty.

But we are -- her claim and her allegations are more than satisfactory of Rule 8(a)(2), and the motions under Rule 12(b) are not sufficient to overcome that.

THE COURT: Thank you.

The following are facts as alleged by plaintiff Bobette Morin which must be assumed to be true on this motion to dismiss. See Conley versus Gibson, 355 U.S. 41, 45-46 (1957).

She has been employed by the New York State Office of Court Administration since 1983. She served as Deputy Chief Clerk of the Onondaga County Family Court from 1986 to 1994. In 1994, she was appointed Chief Clerk of the Onondaga Family Court. She has received many accolades and honors commending her work as Chief Clerk.

Defendant James C. Tormey became District Administrative Judge of the Fifth Judicial District in 2000. He subsequently replaced the incumbent Executive

Assistant with his former law clerk, defendant John R. Voninski.

In or about the summer of 2002, Tormey and Voninski spoke with plaintiff about upcoming judicial elections. They repeatedly tried to elicit information and negative opinions about a political rival and attempted to convince plaintiff to obtain additional negative information about the rival.

Plaintiff refused to do so and stated that in her role as Chief Clerk, she should not become involved in political races and that doing so may be a violation of the rules of the Chief Judge.

From that day forward, plaintiff alleges she was subjected to a continuously hostile work environment by defendants in retaliation for her refusal to participate in the political activity as defendants wanted, and for complaining about the political activities of defendants.

In moving to dismiss, defendants argue that sovereign immunity bars plaintiff's Section 1983 and Family Medical Leave Act claims. She has not responded except as to claims against the defendants in their individual capacities brought under Section 1983. Accordingly, all FMLA claims will be dismissed.

Further, the Section 1983 claims against

New York State, the OCA, and the Unified Court System, as well as the official capacity claims against the individuals will be dismissed.

However, sovereign immunity does not protect the defendants against Section 1983 claims brought against them in their individual capacities, and those claims will not be dismissed on Eleventh Amendment grounds. See Huminski versus Corsones, 396 F.3d 53, 70 (Second Circuit 2005).

Defendants argue that plaintiff fails to state a claim for First Amendment retaliation in that there are insufficient factual allegations to provide notice of the claims, the speech was not protected, she does not allege personal involvement by the defendants, and if there was protected speech, there was no causal connection between any protected activity and the adverse employment actions.

In reply, defendants also argue that the claims are barred by statute of limitations.

The one hundred and forty-two paragraph complaint is replete with factual allegations sufficient to put defendants on notice as to the claims against them. The complaint will not be dismissed on this ground. See Federal Rules Civil Procedure 8.

The complaint alleges that defendants'

retaliation began with her refusal to accommodate their requests to "dig up dirt," so to speak, about political rivals. In essence, this claim is that she was retaliated against, beginning in 2002 and continuing until her demotion and transfer in March 2007, for refusing to participate in certain political activity with defendants.

There is no doubt that this is protected activity. Plaintiff also alleges that beginning in 2006 she began a speak out about the retaliation and what she considered to be improper, even corrupt, activities and interferences with her position as Chief Clerk.

Improper political activities and politically-motivated interference with a high-level state employee such as Chief Clerk are matters of public concern. This is also a protected activity.

Plaintiff makes allegations of personal involvement as to each defendant. For example, she alleges that Voninski required her to call him from an office telephone upon her arrival and departure from the workplace as a harassment to which others were not subjected.

Voninski reassigned plaintiff to Lewis County Family Court in Lowville, one hundred miles from her home. He also reassigned her to Rome upon completion of the temporary assignment in Lowville.

In February 2006, defendant

William F. Dowling threatened plaintiff's position and told her that she had angered the wrong people and that she would be sorry she crossed his path and that he would go directly to Voninski and Tormey, who already wanted to get rid of her.

Plaintiff further alleges in the course of the investigation by the Unified Court System Inspector General's office that she informed the inspector of retaliation that was occurring and her fear that it would continue. She contends that all defendants solicited negative information about her from other employees, and in one case rewarded an employee with a favorable transfer for doing so.

Further, upon her return to regular Chief Clerk duties in Syracuse, Dowling threatened her position again, and both Dowling and Hedges removed some of her duties and responsibilities. These actions escalated and culminated with her demotion from Chief Clerk to Court Attorney Referee in Oswego and Rome, resulting in lower pay and benefits.

These examples just scratch the surface of the allegations against the four individuals defendants, demonstrating that plaintiff has sufficiently alleged personal involvement by each of them in retaliation against her.

Additionally, plaintiff alleges that these acts began as retaliation for refusal to participate in the defendants' political activities as early as 2002, and continuing to March 2007 because she complained about their improper activities and retaliation.

She has alleged sufficient facts of a causal connection between her protected activity and the retaliatory adverse employment action. In short, if she proves these facts, and a discriminatory motive, it would entitle her to relief. See Conley, 355 U.S. at 45-46. She has stated a claim for First Amendment retaliation.

Defendants argue in reply that plaintiff's claims accrued before May 15, 2004, and are therefore barred by the three-year statute of limitations. It is doubtful that this argument should even be addressed because it was not set forth in the original moving papers.

However, according to the allegations of the complaint, the hostile work environment due to retaliation was continuously ongoing since 2002, and the adverse employment actions of demotion and transfer occurred within the three-year limitations period. Accordingly, this argument has no merit.

Based upon the foregoing, the defendants' motion to dismiss the FMLA claims; Section 1983 claims against New York State, the OCA, and the Unified Court

System; and the official capacity claims against the individuals is granted.

Defendants' motion to dismiss plaintiff's Section 1983 claims against the defendants in their individual capacities is denied.

This is the decision of the Court.

Defendants shall file and serve an answer to the remaining claims on or before October 15, 2007. This is the decision of the Court. No written decision will follow. A summary order will be filed.

Anything further, counselors?

MR. DRIESEN: No, your Honor.

MR. QUACKENBUSH: Well, your Honor, we respectfully request additional time for our answer.

THE COURT: Request is denied.

Mr. Minor.

COURT CLERK: Court stands in recess.

(WHEREUPON, the proceedings held on October 11, 2007, were ended.)

C E R T I F I C A T E

I, NANCY L. FREDDOSO, RPR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I recorded stenographically the foregoing at the time and place mentioned; that I caused the same to be transcribed; and that the foregoing is a true and correct transcript thereof to the best of my knowledge, ability, and belief.

I further certify that I am not an attorney or counsel of any parties, not a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

WITNESS, my hand and seal in the County of Herkimer, State of New York.

_____
NANCY L. FREDDOSO
Registered Professional Reporter

My Commission expires March 30, 2011